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No. 80-1429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DUANE YOUNGBERG, et al.,
Petitioners,

v.

NICHOLAS ROMEO, an incompetent, by his Mother and Next Friend, PAULA ROMEO
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OUT OF TIME AND BRIEF OF *AMICI CURIAE* LOWELL P. WEICKER, JR., ROBERT T. STAFFORD AND HARRISON A. WILLIAMS, JR. IN SUPPORT OF RESPONDENT

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LAW REPRINTS EDITOR'S NOTE: THE MOTION OF LOWELL P. WEICKER, JR., ET AL. FOR LEAVE TO FILE A AMICI CURIAE BRIEF OUT OF TIME WAS DENIED BY THE COURT ON JANUARY 11, 1982, HOWEVER IN THE INTEREST OF PROVIDING A COMPLETE RECORD IT IS INCLUDED HEREIN.

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* LOWELL P. WEICKER, JR., ROBERT T. STAFFORD and HARRISON A. WILLIAMS, JR. OUT OF TIME

Amici Lowell P. Weicker, Jr., Robert T. Stafford and Harrison A. Williams, Jr. move for leave to file the attached brief *amici curiae* out of time. In support of this Motion, the *amici* cite the following:

1. The parties to this litigation have consented to the filing of this brief *amici curiae* out of time. Their letters are being filed with the Clerk of this Court.

2. *Amici* are the Chairman and members of the Subcommittee on the Handicapped of the United States Senate Committee on Labor and Human Resources, which has original legislative jurisdiction over matters pertaining to mentally retarded and other disabled and handicapped individuals. As a result of hearings held over a number of years by the Subcommittee, Congress has found that mentally retarded persons can and do benefit from habilitation and therefore concluded that institutionalized retarded persons have a right to appropriate habilitation for their condition directed at maximizing their development. The individual members of the Subcommittee wish to provide this Court with the legislative findings and conclusions developed through extensive Congressional hearings and actions pertaining to the issues in this case.

3. *Amicus* Lowell P. Weicker, Jr., Chairman of the Subcommittee on the Handicapped, is an elected representative of the State of Connecticut. As such, he is concerned with the failure of the *amici curiae* brief filed by the Attorney General of the State of Connecticut to reflect accurately the views of the people of Connecticut. He is further concerned with the inaccurate factual premises contained in the Connecticut brief.

CONCLUSION

Because *amici* have a substantial interest in this case, and because their brief provides a perspective on the issues before this Court which has not been presented in the briefs filed in this case, this motion for leave to file out of time a brief as *amici curiae* should be granted.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE*
LOWELL P. WEICKER, JR.
ROBERT T. STAFFORD and HARRISON A. WILLIAMS, JR.
IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The *amici* are the Chairman and members of the Subcommittee on the Handicapped of the United States Senate Committee on Labor and Human Resources. The Subcommittee has original jurisdiction over matters pertaining to the mentally retarded and other disabled and handicapped individuals.[1] As Chairman and members of the Subcommittee on the Handicapped and of the United States Senate, and as concerned citizens, the *amici* wish to provide this Court with the complete record of Congressional hearings, and the findings and actions based upon these hearings, relating to the rights of the mentally retarded. Based on this record, the *amici* support the positions of the respondent.

In addition, *amicus* Lowell P. Weicker, Jr., Chairman of the Subcommittee on the Handicapped, is a United States Senator from the State of Connecticut. As an elected representative of the people of the State of Connecticut, he is concerned with the failure of the *amici curiae* brief filed by the Attorney General of the State of Connecticut to reflect accurately the views of the people of Connecticut.[2] He is also concerned with the factual inaccuracies upon which the Connecticut brief is based.

Specifically, the *amici* are interested in providing this Court with the record of Congressional hearings, findings and actions which have caused the Congress to conclude that the mentally retarded

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1. The views expressed by the signatories to this *amici curiae* brief are the views of the individuals and do not represent an official position of the Subcommittee on the Handicapped, the Committee on Labor and Human Resources, or the United States Senate.

2. *Amici Curiae* Brief of the States of Connecticut *et al.* (hereinafter referred to as the "Connecticut brief").

"have a right to appropriate treatment, services, and habilitation ... designed to maximize the developmental potential of the person." 42 U.S.C. §6010 (1) and (2).[3]

SUMMARY OF ARGUMENT

It is the position of the *amici* that a mentally retarded person institutionalized in a public facility has a right to habilitation designed to maximize the person's developmental potential.

The Third Circuit in the case at bar correctly assessed the nature of mental retardation and the nature of institutionalization for mental retardation. The findings of the court below and its conclusion that mentally retarded persons confined to state

3. Congress has also concluded, after extensive hearings and investigations, that such treatment, services, and habilitation "should be provided in the setting that is least restrictive of the person's personal liberty". 42 U.S.C. §6010 (2). *Amici* will not address this issue in this brief in light of the Respondent's position that his claims are not premised on a right to least restrictive habilitation or treatment (Resp. Br. 10). However, it should be noted that the experts who presented testimony at hearings before the Subcommittee on the Handicapped agreed "that every effort should be made to insure that our [mentally retarded] citizens are provided every opportunity of being cared for in the least restrictive setting that is consistent with the person's ability for self care." *S. Rep.* 94-160, 94th Cong., 1st Sess. 33 (1975); see *Developmental Disabilities Act Extension and Rights of Mentally Retarded, 1973: Hearings on S.427 and S.458 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare,* 93d Cong., 1st Sess. (1973) (hereinafter referred to as "1973 Hearings"); *Developmentally Disabled Assistance and Bill of Rights Act, 1974: Hearings on S. 3378 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare,* 93d Cong., 2d Sess. (1974) (hereinafter referred to as "1974 Hearings"); *Developmentally Disabled Assistance and Bill of Rights Act, 1975: Hearings on S.462 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare,* 94th Cong., 1st Sess. (1975) (hereinafter referred to as "1975 Hearings"); *Care for the Retarded: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources,* 97th Cong., 1st Sess. (1981) (not yet published) (hereinafter referred to as "1981 Hearings").

The expert testimony before Congress contradicts the claim made in the Connecticut brief that "the profession...is now in a state of total disarray over...whether 'least restrictive' care...is necessarily the best or the most appropriate care available" for retarded persons. (Conn. Br. 3).

institutions have a right to treatment are consistent with the findings and conclusions of Congress developed over more than eighteen years. This record provides persuasive proof that even the most severely retarded persons have the potential to develop needed skills and assume greater responsibility for their own care. The record further shows that the institutionalization of retarded persons for care and treatment constitutes a deprivation of liberty. Failure to provide appropriate habilitation for the condition for which the retarded person has been institutionalized violates his basic rights.

Based on the record established by Congress over the past eighteen years, and for the reasons set forth in the brief of the Respondent and the *amicus* briefs of the American Orthopsychiatric Association *et al.*, and the American Psychiatric Association, the *amici* urge the Court to uphold the right of the institutionalized mentally retarded to adequate habilitation.

ARGUMENT

CONGRESS, BASED UPON EXTENSIVE FINDINGS, HAS RECOGNIZED THE RIGHT OF MENTALLY RETARDED PERSONS TO HABILITATION AS A BASIC LIBERTY TO BE PROTECTED BY GOVERNMENT.

As a result of more than eighteen years of exhaustive study, Congress has recognized that the mentally retarded persons of this nation have certain basic rights that are protected by their government. Congress has rejected the claims made by the petitioners and in the Connecticut brief in the case at bar that retarded persons are incapable of development and therefore need be provided with no more than custodial care. *See e.g., S. Rep.* 94-160, 94th Cong., 1st Sess. 28 (1975).[4] Instead, Congress has affirmed that the mentally retarded have the right to treatment to assist them to maximize their ability for self-care

4. Petitioners concede that retarded persons institutionalized in public facilities have a constitutional right to "food, clothing, shelter, reasonable safety and medical care." (Pet. Br. 11, 12n.10) The Connecticut brief recognizes that states have a duty to provide "food, shelter, supervision and care." (Conn. Br. 8).

and to live normal lives.[5]

Congressional attention was directed to the problems of the mentally retarded in February 1963 when President Kennedy delivered a Special Message to the Congress calling for the implementation of a national program to combat mental retardation. The President urged adoption of a program under which

> "emphasis on prevention, treatment, and rehabilitation will be substituted for a desultory interest in confining patients in an institution to wither away."

1963 *Public Papers of the President* 126, 128, 109 *Cong. Rec.* 1837, 1838 (1963).

Based upon the findings of his President's Panel on Mental Retardation, President Kennedy stated in his 1963 Message:

> We must move from the outmoded use of distant custodial institutions to the concept of community-centered agencies that will provide a coordinated range of timely diagnostic, health, educational, training, rehabilitation, employment, welfare, and legal protection services. For those retarded children or adults who cannot be maintained at home by their own families, a new pattern of institutional services is needed.

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5. As this Court noted in *Pennhurst State School & Hospital* v. *Halderman*, ___*U.S.*___, 101 S. Ct. 1531, 1534n.2, 67 L.Ed.2d 694 (1981), there is a technical difference between "treatment" for mental illness and "habilitation" for mental retardation. "Habilitation" refers to the education, training and care required by retarded individuals to reach their maximum development. *See Halderman* v. *Pennhurst State School & Hospital*, 612 F.2d 84, 95n.14 (3d Cir. 1979); *S. Rep.* 94-160, 94th Cong., 1st Sess. 27-28 (1975).

One court has defined habilitation in terms of "programming designed to maximize an individual's human abilities and to enhance his ability to cope with his environment - [which] includes not only training to facilitate intellectual development, but also training in basic self-help skills, training in elementary communication and social skills, and avoidance of common environmental hazards." *Wyatt v. Ireland*, C.A. No. 3195-N (M.D. Ala. Oct. 25, 1979), at 6.

The terms "treatment" and "habilitation" will be used interchangeably in this brief, as they have by both Congress and the courts. *See Pennhurst State School & Hospital* v. *Halderman*, 101 S.Ct. at 1534n.2; *S. Rep.* 94-160, *supra*.

Id. at 134; 109 *Cong. Rec.* at 1841.[6]

Congress responded to this call by amending the Social Security Act to authorize funding for comprehensive mental retardation plans. *Maternal and Child Health and Mental Retardation Planning Amendments of 1963*, P.L. 88-156, 77 Stat. 273. The law was designed to

> "foster the development of the mental retardation aspects of programs of education, rehabilitation, welfare, employment, health, recreation, and protection of the legal rights of the mentally retarded."

S. Rep. 88-551, 88th Cong., 1st Sess., 1963 *U.S.CodeCong. & Ad.News* 1018, 1020.

Congress complemented this legislation by enacting a federal-state grant-in-aid program for the construction of research centers, facilities for the mentally retarded and community mental health centers in the *Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963*, P.L. 88-164, 77 Stat. 282.[7]

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6. The Task Force on Law of the President's Panel on Mental Retardation concluded that:

"The need of a mentally retarded person to have his personal rights protected does not end with his transfer to the custody of the superintendent of an institution at the conclusion of a hearing. No matter what the purpose of institutionalization, he has a right to receive training and care which will enable him to return to society or to lead a more useful and meaningful life within the institution."

Report of the Task Force on Law of The President's Panel on Mental Retardation 30 (1963).

7. The *Developmentally Disabled Assistance and Bill of Rights Act of 1975*, P.L. 94-103, as amended by P.L. 95-602 (1978), is the direct lineal successor of this Act. *See Compilation: Rehabilitation, Comprehensive Services and Developmental Disabilities Legislation, prepared for the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources* (Comm. Print 1979).

At the core of this legislation was the Congressional finding that the mentally retarded can learn with habilitation and therefore are entitled to fully develop their potential through treatment:

> To attack the problem of mental retardation the States require a comprehensive program of services including diagnosis, treatment, residential care, day care, education, training, and rehabilitation. Sheltered workshops can be of great assistance as part of a comprehensive center organized to restore the mentally retarded to the maximum degree of normal living in his community. In the absence of a coordinated program of services the mentally retarded person is denied the opportunity to develop most fully his potential for contributing to our society.

H. Rep. 88-694, 88th Cong., 1st Sess., 1963 U.S.CodeCong. &Ad.News 1054, 1061.[8]

The programs begun under the two 1963 Acts were continued and expanded in the *Mental Retardation Facilities and Community Mental Health Centers Construction Act Amendments of 1965*, P.L. 89-105, 79 Stat. 427, and the *Social Security Amendments of 1965*, P.L. 89-97, 79 Stat. 286, pursuant to which funds were authorized for the states to begin implementing the comprehensive mental retardation plans developed with previous funding.

Congress extended and further expanded these federal programs in 1967 to include grants to the states for the staffing and start-up expenses of community facilities. *Mental Retardation Amendments of 1967*, P.L. 90-170 §4, 81 Stat. 527.

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8. *See also Federal Aid for Construction and Operation of Community Health and Research Centers: Hearings Before the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. (1963); *Mental Health and Mental Retardation Programs: Hearings on H.R. 2567, 3688, 3689, 3939, 3940, 3947, 3948, 4622, 4623, 4663, 4664, 5023 and 5127 Before the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 1st Sess. (1963).

The programs were expanded in light of Congress' continued recognition that

> "mentally retarded children can be educated to be useful citizens, in many cases self-supporting, and in most instances to be free of the need for expensive institutional care. If adequately rehabilitated, between 75 percent and 85 percent of the mentally retarded can become self-supporting; between 10 percent and 20 percent can become partially self-supporting; only the remainder will continue to remain completely dependent."

S. Rep. 90-725, 90th Cong., 1st Sess., 1967 *U.S.CodeCong.& Ad.News* 2061, 2071 (views of Sen. Javits and Sen. Prouty).

In 1970, Congress passed the *Developmental Disabilities Services and Facilities Construction Amendments*, P.L. 91-517, 84 Stat. 1316. The emphasis of the new law was on planning and services rather than construction of facilities. It instituted a broad new federal-state grant-in-aid program to help the states develop and implement a comprehensive plan to meet the needs of the mentally retarded and developmentally disabled. *See* P.L. 91-517 §101(b), 84 Stat. 1316.[9] In this legislation, Congress broadened its concern from mental retardation alone to include other developmental disabilities such as cerebral palsy, epilepsy and other neurological conditions requiring similar treatment. Congress expressly embraced the developmental view that all mentally retarded, even the severely and profoundly retarded, have potential for learning and growth. *See S. Rep.* 94-160, 94th Cong., 1st Sess. 6-7 (1975). This approach, and the findings of Congress in this regard, were recognized by the Third Circuit in the case at bar. *Romeo* v. *Youngberg*, 644 F.2d 147, 165n.40 (3d Cir. 1980). The developmental view has also been judicially recognized in *Wyatt* v. *Stickney*, 344 F.Supp. 387, 390 (M.D. Ala. 1972), *aff'd in part, rev'd in part, sub nom. Wyatt* v. *Alderholt*, 503 F.2d 1305 (5th Cir. 1974); *Halderman* v. *Pennhurst State School & Hospital, supra*, 612 F.2d at 95n.14;

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9. *See Mental Retardation and Other Developmental Disabilities, 1969: Hearings Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess. (1969); *Developmental Disabilities Services and Facilities Construction Act of 1970: Hearings Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. (1970).

Pennsylvania Association for Retarded Children v. *Commonwealth of Pennsylvania*, 334 F. Supp. 1257, 1259 (E.D.Pa. 1971) (three judge court); *Welsch* v. *Likins*, 373 F. Supp. 487, 495 (D.Minn 1974).

In 1971 Congress passed legislation requiring retardation facilities under the Medicaid program to provide habilitative services designed to enable the institutionalized mentally retarded to develop to their full potential. P.L. 92-223 §4, 85 Stat. 802 (1971); 42 U.S.C. §1396d (d). This legislation was designed to provide federal funding for the "active provision of rehabilitative, educational and training services to enhance the capacity of mentally retarded individuals to care for themselves or to engage in employment." 117 *Cong. Rec.* 44720 (1971) (remarks of Sen. Bellmon); *see also* 117 *Cong. Rec.* 44721 (1971) (remarks of Sen. Long).

Following extensive hearings, Congress in 1975 enacted the *Developmentally Disabled Assistance and Bill of Rights Act*, P.L. 94-103, 89 Stat. 486.[10] In addition to extending and revising the programs initiated under the earlier Act, the new law established a bill of rights for the mentally retarded and other developmentally disabled.[11]

Testimony given during the three years of hearings held by the Senate Subcommittee on the Handicapped on this legislation repeatedly established that mentally retarded and other developmentally disabled persons confined to public facilities were being denied their constitutional rights. Information

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10. *See* 1973 Hearings, *supra*; 1974 Hearings, *supra*; *Health Services Revenue Sharing, Part 2: Hearings on H.R. 11511, 11518, 11845 and 12892 Before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 2d Sess. (1974); *H.R. Rep.* 93-1127, 93d Cong., 2d Sess. (1974); 1975 Hearings, *supra*; *Health Services Programs: Hearings on H.R. 2954 Before the Subcomm. on Public Health and Environment of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. (1975); *S. Rep.* 94-160, 94th Cong., 1st Sess. 3-4 (1975).

11. Although this Court held in *Pennhurst State School & Hospital* v. *Halderman*, *supra*, that Congress did not create substantive rights in enacting this legislation, the findings of Congress were not disputed.

received by the Subcommittee indicated that

> "the institutionalized mentally retarded are the most neglected of all persons in our society. They have been subjected to ethical and legal abuses, with loss of rights, both civil and personal, frequently occurring without even a semblence of due process."

S. Rep. 94-160, 94th Cong., 1st Sess. 3 (1975); 1973 Hearings, *supra* at 323, 341.

The Subcommittee on the Handicapped heard extensive testimony concerning the conditions at various public facilities for the retarded, including the Willowbrook State School for the Mentally Retarded in New York and the Partlow State School and Hospital in Alabama. *S. Rep.* 94-160, 94th Cong., 1st Sess. 28-34 (1975).[12] Also considered was the judicial holding that

> "People involuntarily committed through non-criminal procedures to institutions for the mentally retarded have a constitutional right to receive such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society. That this position is in accord with the applicable legal principles is clear beyond cavil."

Wyatt V. Stickney, supra, 344 F. Supp. at 390; *see S. Rep.* 94-160, 94th Cong., 1st Sess. 30-32 (1975).

Based on the evidence before it, the Senate Committee on Labor and Public Welfare found that

> "...most large institutions for the developmentally disabled in the U.S. lack individualized treatment plans and programs. That is, care is primarily custodial; and little attention is paid to the resident's potential for increased self care, ability to utilize education or training."

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12. The conditions at Pennhurst State School and Hospital in the case at bar apparently are at least as "lamentable" as those in the institutions reviewed by Congress. *Romeo* v. *Youngberg, supra* at 181 (Seitz, C.J., dissenting).

Id. at 30. The Committee concluded that

> "Congress must take action to ensure the humane care, treatment, habilitation and protection of the mentally retarded. The Federal Government has the responsibility to provide equal protection under the law to all citizens."

Id. at 32.

Reflecting its "concern about persons who are institutionalized because they are developmentally disabled," *id.* at 3, the Committee approved a bill of rights containing "minimum standards to insure basic human dignity where institutional care for developmentally disabled persons is found." *Id.* at 33. The goal of these standards was "one of habilitation of the developmentally disabled individual who is in need of services." *Id.* at 34.

The standards approved by the Committee were predicated on the concept that all retarded persons can develop to their full potential with appropriate treatment. This view

> "...stresses that all developmentally disabled individuals have potential for learning and growth.
>
> From this developmental model, it follows that custodial care which is predicated on the assumption that certain individuals are essentially incapable of development must be rejected. The newer developmental model emphasizes concrete program goals for individuals and therefore encourages evaluation based on specific outcomes.
>
> A final, but critically important dimension of this new model is that developmentally disabled persons should live like nondevelopmentally disabled persons to the greatest degree possible.
>
> Every effort should be made to assist developmentally disabled persons to maximize their ability for self-care and to live normal lives."

Id. at 28.[13]

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13. The Connecticut brief, in effect, attacks this conclusion by stating that the mental retardation profession is in " a state of total disarray" over the

The view that the mentally retarded are "eternal children" incapable of development and requiring indefinite custodial care was totally rejected. *Id.*

The bill of rights for retarded persons was approved by the full Senate without objection. 121 *Cong. Rec.* 16522-23 (1975). It was evident during the full Senate's consideration of the legislation that the rights enunciated in the bill were deemed to be basic rights guaranteed to the mentally retarded. Senator Javits, the primary sponsor of the bill of rights provision, stated that

> "This bill of rights represents a reaffirmation of the basic human and civil rights of all citizens....
>
> Progress toward recognition of the basic human and civil rights of the mentally retarded and other developmentally disabled persons has been slow. The Federal Government has largely abrogated its responsibility in this regard and recently the greatest initiatives have come from our courts....

(fn 13 cont.)

question of whether all retarded persons can develop their self-help skills and reach their full potential through habilitation. (Conn. Br. 3-5, 22). As discussed *infra*, at n.21, and in the *amicus* brief of the American Orthopsychiatric Association *et al.*, this is simply not true.

Furthermore, "the most recent developments in the frequently cited *Wyatt* litigation" (Conn. Br. 3) provide further support that retarded persons benefit from habilitation, and do not, as claimed in the Connecticut brief, contradict this conclusion. The *Wyatt* court rejected the conclusions (cited in the Connecticut brief) of the experts employed by the State of Alabama in their attempt to modify the "Minimum Constitutional Standards for Adequate Treatment". *Wyatt* v. *Ireland*, C.A. No. 3195-N (M.D.Ala., Oct. 25, 1979), at 5-6, 9-10. The court specifically held that

> "[D]efendants seek to divide the residents into two groups: one to receive education and training; the other to receive enriching activities. They allege that the impetus behind this proposal is the fact that the nature of the resident population at Partlow has changed significantly since 1972. Eighty percent of the present population are severely or profoundly retarded; thirty-four percent have multiple physical handicaps.

> Congress should reaffirm its belief in equal rights for all citizens -- including the developmentally disabled. Congress should provide the leadership to change the tragic warehousing of human beings that has been the product of insensitive federal support of facilities providing inhumane care and treatment of the mentally retarded. The bill of rights... represents this new direction, and begins this reaffirmation."

121 *Cong. Rec.* 16519 (1975).

Senator Stafford, at the time the ranking minority member of the Subcommittee on the Handicapped, stated on the floor of the Senate that the bill of rights

> "...was added to assist in the protection of the rights guaranteed under our Constitution for those individuals that will require institutionalization."

121 *Cong. Rec.* 16516 (1975).

Senator Schweicker, now Secretary of the Department of Health and Human Services, a cosponsor of the bill of rights provision, said during the Senate debate that

> "I strongly support four specific requirements in this bill of rights: Humane care, treatment, rehabilitation, and protection in residential facilities....Too often developmentally disabled persons are 'put away' in an institution and

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(fn 13 cont.)

> The Court acknowledges this change and is aware that adjustments must be made as the nature and needs of the population change. Training and educational services must be modified so they are suitable to the needs of the individual. The evidence does not persuade the Court, however, that the minimum constitutional standards should be modified to allow defendants to cease providing habilitation programming and to provide instead an 'enriched environment'. The constitutional right of each resident to a habilitation program which will maximize his human abilities and enhance his ability to cope with his environment would be threatened by this modification proposed by defendants. The Court will therefore deny defendants' motion to modify the 1972 order in this respect." *Id.* at 9-10.

> forgotten....Treating the developmentally disabled with more human dignity can bring additional benefits to themselves, their families, and to society."

121 *Cong. Rec.* 16522 (1975).

The Conference Committee on the bill replaced the lengthy Senate bill of rights with "a compromise which specifie[d] rights of the developmentally disabled." *H.R. Conf. Rep.* 94-473, 94th Cong., 1st Sess. 41, 1973 *U.S.CodeCong.&Ad.News* 943, 961.[14] The compromise "enumerate[d] Congressional findings respecting the rights of persons with developmental disabilities," including the finding that "the developmentally disabled have a right to appropriate treatment, services and habilitation." *Id.* at 41-42, 1973 *U.S.Code Cong.&Ad.News* 961. The right was

> "...included in the conference substitute in recognition by the conferees that the developmentally disabled, particularly those who have the misfortune to require institutionalization, have a right to receive appropriate treatment for the conditions for which they are institutionalized, and that this right should be protected and assured by the Congress and the courts."

Id. at 42, 1973 *U.S.CodeCong.&Ad.News* 961.

Both Houses of Congress concluded that

> "(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.
>
> (2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person....

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14. The version of the legislation passed by the House of Representatives did not contain a bill of rights provision. *See H.R. Conf. Rep.* 94-473, 94th Cong., 1st Sess. 41, 1973 *U.S. Code Cong.&Ad.News* 943, 961.

> (3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institution or other residential program for persons with developmental disabilities that -
>
> (a) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons...."

P.L. 94-103 §111; 42 U.S.C. §6010.

The bill of rights was amended in 1978 to clarify that the enumerated rights were not exclusive. P.L. 95-602 §507, 92 Stat. 2955 (1978). *See H.R. Rep.* 95-1188, 95th Cong., 2d Sess., 1978 *U.S. Code Cong.&Ad.News* 7355, 7377.[15]

The ability of severely retarded and handicapped people to develop to their maximum potential with adequate habilitation and treatment led Congress to enact legislation in addition to the bill of rights to assure the provision of such assistance. Thus, building on the foundation established in the *Education of the Handicapped Amendments of 1974*, P.L. 93-380 §611 *et. seq.*, 88 Stat. 484, Congress in the *Education for All Handicapped Children Act of 1975*, P.L. 94-142, 89 Stat. 773, required that "the State[s] assure all handicapped children the right to a free appropriate public education...regardless of the severity of their handicap." 20 U.S.C. §1412(1) and (2) (c). Congress further required that a priority in implementing a free appropriate public education be given to those with "the most severe handicaps who are receiving an inadequate education." 20 U.S.C. §1412(3).

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15. The amendment added the following sentence:

> "The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons."

The 1978 legislation also changed the short title of the 1975 legislation to the "Developmental Disabilities Assistance and Bill of Rights Act." P.L 95-602, Title V (1978).

These requirements were imposed after extensive hearings held by the Senate Subcommittee on the Handicapped and in the House of Representatives.[16] Based on these hearings, it was concluded that

> "with proper education services, many [of the handicapped] would be able to become productive citizens, contributing to society instead of being forced to remain burdens."

S. Rep. 94-168, 94th Cong., 1st Sess. 9, 1975 *U.S.CodeCong.& Ad.News* 1425, 1433.

Similarly, with regard to severely retarded adults, Congress in the *Rehabilitation Act of 1973*, P.L. 93-112, 87 Stat. 355, completely revised the existing vocational rehabilitation program to provide

> "vocational rehabilitation services to handicapped individuals and to provide such services for the benefit of such individuals, serving first those with the most severe handicaps, so that they may prepare for and engage in gainful employment."

29 U.S.C §701(1); *see also* 29 U.S.C. §721(a) (5) (A).[17]

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16. *See Education for the Handicapped, 1973: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. (1973); *Education of the Handicapped Act Amendments: Hearings Before the Select Subcomm. on Education of the House Comm. On Education and Labor*, 93d Cong., 1st Sess. (1973); *Education for All Handicapped Children, 1973-74, Parts 1-4: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. (1974); *Financial Assistance for Improved Educational Services for Handicapped Children: Hearings Before the Select Subcomm. on Education of the House Comm. on Education and Labor*, 93d Cong., 2d Sess. (1974); *Education for All Handicapped Children, 1975: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. (1975).

17. *See S. Rep.* 93-318, 93d Cong., 1st Sess., 1973 *U.S.Code Cong.&Ad.News* 2076, 2092; *Rehabilitation Act of 1972, Parts 1 & 2: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. (1972); *Vocational Rehabilitation Services for the Handicapped: Hearings Before the Select Subcomm. on Education of the House Comm. on Education and Labor*, 92d

Congress, in this legislation, passed a civil rights act for disabled persons. P.L. 93-112 §504; 29 U.S.C. §794, Employing the exact language found in Title II of the *Civil Rights Act of 1964*, P.L. 88-352 §*601, 78 Stat. 252; 42 U.S.C.* §2000d, Congress provided that no mentally retarded or otherwise handicapped person

> "...shall...be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

29 U.S.C. §794.

The basic premise of the legislation, as indicated by Senator Humphrey in introducing the bill that was eventually enacted into law, was that mentally retarded and other handicapped people have a right to develop to their maximum potential:

> These people have the right to live, to work to the best of their ability - to know the dignity to which every human being is entitled. But too often we keep children, whom we regard as "different"...out of our schools and community activities altogether, rather than help them develop their abilities.... [They] are barred from our vocational training programs and from countless jobs they could perform well....
>
> These are people who can and must be helped to help themselves....[T]his is their constitutional right.

118 *Cong. Rec.* 525 (1972).

(fn. 17 cont.)

Cong., 2d Sess. (1972); *Rehabilitation Act, 1973: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. (1973); *Vocational Rehabilitation Services, Parts 1 & 2: Oversight Hearings Before the Select Subcomm. on Education of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. (1973); *Rehabilitation Act Amendments of 1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. (1974).

Recognizing that even the most severely handicapped person can learn when afforded the opportunity and that all handicapped persons have the right to develop to their full potential, Congress in the Rehabilitation Act rejected the view that mentally retarded and other handicapped individuals are "hopelessly incapable" persons to be consigned to "terminal care in an institution." *See* 118 *Cong. Rec.* 525 (1972) (remarks of Sen. Humphrey); 117 *Cong. Rec.* 42293-94 (1971) (remarks of Sen. Cook) *incorporated in* 118 *Cong. Rec.* 526 (1972) (remarks of Sen. Percy); 117 *Cong. Rec.* 45974-75 (1971) (remarks of Rep. Vanik); *S. Rep.* 93-1297, 93d Cong., 2d Sess., 1974 *U.S.CodeCong.&Ad.News* 6388-91.

In 1980, Congress responded to the "deplorable" conditions existing in public facilities for the mentally retarded and other institutions by passing the *Civil Rights of Institutionalized Persons Act*, 96-247, 94 Stat. 349 (1980). This legislation granted the United States Attorney General statutory authority to participate in civil actions brought to redress systematic deprivations of constitutional and Federal statutory rights of persons residing in state institutions.

Testimony presented to the Senate Committee on the Judiciary during hearings on this legislation revealed that there was "uniform agreement among those familiar with institutional environments that thousands of individuals [are] subjected to conditions and practices flagrantly violative of their most basic human rights." *S. Rep.* 96-416, 96th Cong., 1st Sess. 18, 1980 *U.S.CodeCong.&Ad.News* 787, 800.[18]

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18. Extensive hearings were held on this legislation. *S. Rep.* 96-416, *supra* at 9, 1980 *U.S.CodeCong.&Ad.News* 790; *see Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) (hereinafter referred to as "1977 Judiciary Hearings"); *Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977); *Civil Rights of the Institutionalized: Hearings on S. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979); *Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979).

Testifying on the experiences of the Justice Department in litigation to vindicate the rights of institutionalized mentally retarded people, Assistant Attorney General Drew S. Days, III concluded that:

> The experience of the Department in such litigation has demonstrated the existence of widespread practices in the operation of institutions in which persons are confined which deprive such persons of constitutional or statutory rights.

Id. at 18, 1980 *U.S.CodeCong.&Ad.News* 800.[19]

In enacting this legislation, Congress recognized that the institutionalized mentally retarded were not receiving the habilitation to which they had a right. *See* S. 1393 §4(1), 95th Cong., 1st Sess. (1977), *reprinted in* 1977 Judiciary Hearings, *supra* at 3; 1977 Judiciary Hearings, *supra* at 197; *S. Rep.* 96-416 , 96th Cong., 1st Sess. 7-8, 1980 *U.S.CodeCong.&Ad. News* 789.

In August of 1981, Congress reauthorized funding for the programs in the *Developmental Disabilities Assistance and Bill of Rights Act.*[20] In so doing, the Conference Committee strongly reemphasized the Congressional findings contained in the bill of rights that mentally retarded and other developmentally disabled persons have a right to habilitation:

> [T]he Conferees re-emphasize that they believe that developmentally disabled persons have a right to habilitative services in a setting which is least

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19. The Justice Department had been instructed by President Nixon to "take steps to strengthen the assurance of full legal rights for the retarded". 1971 *Public Papers of the President* 1111, 1112. During the Ford Administration, the Department was extensively involved in litigation to protect the rights of mentally retarded persons, and actively advocated in its efforts the establishment of a constitutional right to treatment for involuntarily institutionalized mentally retarded citizens. *See* Remarks of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, *reprinted in 121 Cong. Rec.* 19371-73 (1975) (remarks of Rep. Brademas). These efforts continued under President Carter. *See S. Rep.* 96-416, 96th Cong., 1st Sess. 39, 1980 *U.S.CodeCong.&Ad.News* 821.

20. P.L. 97-35 §911, 95 Stat. 357.

> restrictive of their personal liberty in accordance with section 111 of the Developmental Disabilities Assistance and Bill of Rights Act. [42 U.S.C. §6010]. The Congress will continue to examine this issue to ensure that developmentally disabled persons truly have a right to habilitative services in a setting least restrictive of their personal liberty....

H.R. Conf. Rep. 97-208, 97th Cong., 1st Sess. 800 (1981)

Prior to this Congressional action, the Senate Subcommittee on the Handicapped held two days of hearings during which the Congressional findings and actions in enacting Section 6010 were thoroughly reviewed. *Care for the retarded Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. (1981). The witnesses at these hearing agreed that the right to habilitation was essential to ensure the development of retarded persons to their maximum potential.[21] The testimony

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21. The statements given by the mental retardation professionals of the State of Connecticut at these hearings directly refute the position taken by the Attorney General of the State of Connecticut in the Connecticut brief. (Conn. Br. 3-5. 18).

Gareth D. Thorne, Commissioner of the Connecticut Department of Mental Retardation, in his statement to the Subcommittee stated that the "mentally retarded represent a group of society's members who ... need special facilities and programs to insure the development of their maximum intellectual and adaptive potential." 1981 Hearings, *supra* . Roger McNamara, superintendent of Connecticut's "training school" for the mentally retarded, endorsed "the right to full treatment and habilitation". 1981 Hearings, *supra*. These statements belie the Connecticut brief's rejection of the developmental model. (Conn. Br. 3-5, 18).

The statements of the Connecticut mental retardation professionals accurately reflect the views of the people of Connecticut as established by public law. An institutionalized mentally retarded person in Connecticut has the right to "receive ... treatment which is adequate for his needs and for his development to his full potential ...." Conn. Gen. Stats. §19-575a(b). The rights of Connecticut's institutionalized mentally retarded were expanded by statute during the most recent session of the Connecticut General Assembly. P.A. 81-150 (1981).

overwhelmingly showed that even the most severely retarded individuals are able to develop given adequate habilitative services.[22]

Therefore, Congressional findings and conclusions over a period of more than eighteen years, culminating in the testimony presented at the hearings of the Senate Subcommittee on the Handicapped in the spring of 1981 and the subsequent Congressional reaffirmation of the right of mentally retarded persons to habilitation, support the judgment of the Third Circuit in the case at bar. Congress has specifically concluded that through habilitation a retarded person can acquire the basic self-care skills that will permit him to live in a community setting. Equally important, Congress has found that without such habilitation, the mentally retarded person's condition will deteriorate. Thus, although a retarded person might acquire sufficient skills to enable him to be released from an institution, inadequate habilitation will surely turn a temporary confinement into a life-long one.

Congressional findings establish that the right to treatment for the mentally retarded is a basic liberty and an equal protection right essential for retarded persons to maximize their

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(fn. 21 cont.)

In addition, Dr. Jennifer Howse, Deputy Secretary of the Office of Mental Retardation of the Pennsylvania Department of Public Welfare, indicated at the hearings of the Senate Subcommittee on the Handicapped that as the result of the *Pennsylvania Mental Health and Mental Retardation Act of 1966*, 50 Pa. Stat. Ann. §4401 *et seq.*, Pennsylvania has "developed a strong commitment to the provision of community services to mentally retarded people based on the normalization principle and the developmental model". 1981 Hearings, *supra*. She further stated that "Pennsylvania's program clearly demonstrates that all mentally retarded people can benefit from community programs". 1981 Hearings, *supra*. Thus, mental retardation officials of Pennsylvania have acknowledged that the state has a commitment to provide the mentally retarded with more than custodial care. (*See* Pet. Br. 17).

22. For example, G. Thomas Bellamy, Ph.D. from the University of Oregon related the story of how fifteen severely (IQ of 20-35) and profoundly (IQ of 0-19) retarded persons have learned to assemble small parts such as oscilloscope cam-switch actuators, circuit boards, chain saw components and transformer coils. 1981 Hearings, *supra*.

ability for self-care and to live normal lives. As the actions of Congress over the past eighteen years establish, it is a right which must be protected by the entire government.

For the reasons contained in the records of Congressional hearings, and the findings and conclusions based on these hearings, and for the reasons set forth in the Respondent's brief and the *amicus* briefs of the American Orthopsychiatric Association *et al.* and the American Psychiatric Association, this Court should uphold the right of the mentally retarded to adequate habilitation.

CONCLUSION

Amici join Respondent in respectfully urging this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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